UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

FLOYD BUCHER & SON, INC.
Employer

and — Case No. 8-RC-16205

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

- -

THE DOTSON COMPANY
Employer

and — Case No. 8-RC-16206

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

- -

THE LATHROP COMPANY
Employer

and — Case No. 8-RC-16208

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

- -

McNERNEY & SON
Employer

and — Case No. 8-RC-16209

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

THE SPIEKER COMPANY
Employer

and Case No. 8-RC-16212

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

- -

STANDFORD E. THAL, INC.
Employer

and Case No. 8-RC-16213

OPERATIVE PLASTERERS & CEMENT
MASONS INT'L ASSOC., LOCAL UNION 886
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[1]

The following employees constitute a unit appropriate for the purposes of collective

[1] All parties filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employers. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

bargaining within the meaning of Section 9(b) of the Act:[2]

> *All full-time and regular part-time cement masons employed by employers who have assigned their bargaining rights to Associated General Contractors of Northwest Ohio, Labor Relations Division, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.*

The record indicates that these six Employers employ approximately 20 cement masons. However, is unclear as to how many employees are employed in the multi-employer unit I find to be appropriate.

The first issue before me is whether the International Union of the Bricklayers and Allied Craftworkers (BAC) should continue to be accorded intervenor status in this matter. The Petitioner and Employer urge that BAC's conditional intervenor status should be rescinded. BAC argues that it should continue to be accorded intervenor status.

With respect to the issue of the scope of the unit, the Petitioner and Employer argue that six separate employer-wide units are appropriate and they should be permitted to enter into stipulated election agreements providing for such elections. BAC's position on this issue is that the only appropriate unit is a single one of cement masons employed by all employers that have assigned their bargaining rights to the Associated General Contractors of Northwest Ohio, Labor Relations Division (AGC). It further argues that this unit should be limited to those counties in Ohio and Michigan covered by the current cement masons agreement between the Petitioner and the AGC.

I agree that BAC's conditional intervenor status should be rescinded as it has presented no probative evidence that any unit employees have designated it as their collective bargaining representative. However, as the record evidence clearly establishes that the petitioned-for units

[2] These petitions involve a recognized bargaining representative seeking certification during the term of a Section 9(a) agreement. This presents a long recognized exception to contract bar rules. **General Box Co.**, **82 LRB 678**

are not appropriate, I decline to approve the proposed stipulated election agreements. Instead, I find that only a multi-employer unit, unrestricted by geographic boundaries, is appropriate.

Intervenor Status of BAC

The hearing officer initially granted intervenor status to BAC based on assertions that it was a party to contracts covering certain employees in the petitioned-for units. I denied an interim appeal on the issue, finding that the hearing officer's decision was necessary to allow a more complete record to be developed. After considering a special appeal, the Board denied review of my Order without prejudice to renewing the issue at the conclusion of the hearing. Reconsidering the issue based on the entire record, I find that BAC cannot establish a colorable claim to represent any of the cement masons in the appropriate unit.

The Board's Casehandling Manual, Part Two, Representation Proceedings, Section 11022 sets forth the appropriate methods by which a party can establish the necessary showing of interest to participate in a representation proceeding.[3] BAC does not claim to be the recognized or certified representative of any unit employees or to possess authorization or membership cards from any employees in the unit found appropriate herein; the first three methods provided for the manual. Instead, the record establishes that all unit employees are either members of the Petitioner or represented by it pursuant to the terms of the AGC agreement.

BAC does claim, however, to be party to contracts covering certain unit employees. Since the appropriate unit includes only cement masons, not the bricklayers that BAC

(1948).

[3] A union will be regarded as satisfying the showing requirement as a petitioner in a RC case or as an intervenor in a RC, RM, or RD case if:

(a) it has submitted authorization cards or a list of signatures designating the union as the signers' agent for collective-bargaining purposes

(a) it has submitted evidence from its records as to the individuals who are members of the union

(a) it is the certified or currently recognized bargaining agent of the employees involved (in this circumstance, a union continues as a party, unless it disclaims interest in representing the employees involved (Sec. 11120))

(a) it is the party to a currently effective more recently expired exclusive collective-bargaining agreement covering the employees involved in whole or in part. In the construction industry, a recently expired

historically represents, one or more of these agreements must therefore apply to cement masons in the unit found appropriate.[4] There are two Section 8(f) pre-hire contracts in evidence that purport to cover a unit of cement masons and bricklayers. One is a Michigan multi-employer agreement to which both BAC Local 9 and Spieker are signatory. The record establishes that Spieker has not employed cement masons (or any employees) under the terms of this contract for at least two years. A second multi-employer agreement that BAC Local 46 is party to states that it applies to cement masons working in certain Ohio counties. Only Lathrop and Thal have ever been signatories to any association agreement with Local 46. Lathrop signed a project only agreement in 1997 applicable to a job long since completed. Thal signed a letter of assent in 1985 to be bound by the then extant Local 46 association agreement. However, there is no record evidence that it has ever applied the current (or previous) Local 46 agreement to any of its employees.

There are several Section 9(a) agreements in evidence which establish that various BAC locals represent separate units of bricklayers, without inclusion of cement masons. At most, the record shows there may be the potential for some limited overlap between the work claimed by the Petitioner and BAC. But this is no substitute for a showing that the above-noted BAC contracts have ever been applied to any of the cement masons in this unit. As there is not even the potential for any unit employees eligible to vote in the election directed herein to have been covered by any of the agreements relied upon by BAC, I rescind its intervenor status in these matters.

The Scope of the Unit

8(f) agreement will suffice as a union's showing of interest for a RC petition. **Stockton Roofing Co., 304 NLRB 699 (1991)**.

[4] BAC has not argued that bricklayers must be included in any unit found appropriate in this case.

Even though BAC is no longer a party in this matter, I decline to direct elections in the single employer units sought by the Petitioner and Employer as they are clearly inappropriate.[5] Instead, for the reasons discussed below, I have determined that the only appropriate unit is a multi-employer unit of all cement masons employed by employers who have assigned their bargaining rights to AGC.

The Employers are all general contractors located near Toledo, Ohio. All employ varying numbers of cement masons. The terms and conditions of these masons' employment have long been governed by a series of multi-employer collective bargaining agreements between the AGC and the Petitioner. Each of the Employers assigned their rights to bargain with the Petitioner to AGC years or even decades ago. The current AGC agreement is effective by its terms from July 1, 2000 through June 30, 2004. Said agreement states that it covers only certain counties in Ohio (Lucas, Wood, Hancock, Putnam, Fulton, Williams, Henry, Defiance and Paulding) and Michigan (Monroe).[6] However, it is clear from the record that all the Employers, with the exception of McNerney, have performed work outside these counties. When so doing, each use cement masons who are part of their regular work crews and they apply the AGC agreement to this work. Witnesses from these five employers all testified that they would not restrict their future search for jobs to the counties in question.

Initially, I note that the AGC contract is an agreement entered into under Section 9(a) of the Act rather than under Section 8(f). Article II of said agreement states that the Petitioner has demonstrated its majority status in the unit and has been granted Section 9(a) recognition based thereon. This language is sufficient to establish the Section 9(a) status of the labor organization that is party to the contract. **Staunton Fuel & Material, Inc., 335 NLRB No. 59 (2001).** The

[5] The Board certainly has the power to reject proposed election agreements it deems improper. **Howard University, 224 NLRB 385 (1976), fn 11.** The Board has also noted that Regional Directors have broad discretion in all matters relating to such agreements **SuperValu Stores, 179 NLRB 469 (1969).**

[6] This corresponds with the geographic jurisdiction assigned to the Petitioner by its parent organization, Plasters and Cement Masons International Association of the United States and Canada.

record establishes that this Section 9(a) multi-employer unit was in existence for years at the time these petitions were filed and there is no evidence of any history of single employer bargaining. Therefore, only the recognized multi-employer unit is an appropriate unit in which to direct an election. **Central Transport, Inc., 328 NLRB 407 (1999).** That unit must include all employers who have assigned their bargaining rights to AGC and who employ cement masons pursuant to the terms of this agreement, not just these six employers. **Central Transport, supra and Casale Industries, 311 NLRB 951 (1993).**

The Petitioner and Employer argue that cases including **John Deklewa & Sons, 282 NLRB 1375 (1987), Alley Drywall, Inc., 333 NLRB No. 132 (2001)** and **Comtel Systems Technology, Inc., 305 NLRB 287 (1991)** dictate that the proposed single employer units should be found appropriate. **Deklewa** and **Alley Drywall, supra** dealt with Section 8(f) relationships. The Board made quite clear in **Casale** and subsequent decisions that Section 9(a) and Section 8(f) relationships are viewed differently in deciding whether smaller units may be severed from established multi-employer units. While a history of Section 8(f) multi-employer bargaining does not preclude representation elections in single employer units, long-term multi-employer bargaining arising from a Section 9(a) relationship does. **Casale, supra**.

In **Comtel,** cited above, the Board found a multi-employer agreement did not bar an election in a single employer unit because the union did not, in fact, have majority status at the time the employer became a member of the association. Accordingly, the Board determined that when the employer filed its RM petition it was bound only to an 8(f) agreement and thus the multi-employer agreement did not bar the petition. In **Comtel**, the petition was filed within six months of recognition under the multi-employee agreement. **Casale** made clear that a challenge to the 9(a) relationship must be made within six months. The instant petitions were clearly filed more than six months after this Section 9(a) relationship began. Accordingly, the rationale of **Comtel, supra** does not apply here.

Both the Employer and Petitioner argue that whatever unit is deemed appropriate, it should have no geographic limitations. The Board does not normally define the scope of a bargaining unit in geographic terms. See **P.J. Dick Contracting, Inc., 290 NLRB 150 (1988), fn 10.** To the extent that the Board has done so in that and subsequent cases, it was seemingly because all parties sought some geographic limits, but could not agree on what they should be. **Oklahoma Insulation Company, 305 NLRB 812 (1991), Dezcon, Inc., 295 NLRB 109 (1989).** While the AGC agreement seemingly establishes geographic boundaries to the unit, the record shows that no such limits actually exist. With the exception of one employer that has chosen not to work outside the geographic jurisdiction of the Petitioner, the evidence is clear that these Employers periodically perform masonry work outside the counties named in the contract and apply the terms of the AGC agreement whenever they do so. I decline to exalt form over substance and place limits on the existing unit that the parties do not recognize. Accordingly, I have directed an election in the unit currently recognized by the parties' practice-one without geographic limits.

While the record does not reflect how many additional employers have assigned their bargaining rights to the AGC and employ cement masons under the terms of the AGC agreement, the parties stipulated that there are, in fact, others beyond these six Employers. As I have directed an election in a unit potentially substantially larger than the petitioned for units, I will allow the Petitioner 10 days from the date of this Decision and Direction of Election to demonstrate that it has the necessary showing of interest to support an election in the unit I find appropriate. **Brown Transport Corp., 296 NLRB 1213 (1989).**[7] If the Petitioner fails to do so, the petition will be dismissed.

[7] At hearing, the Petitioner indicated a willingness to proceed to an election in a unit different than those petitioned for.

Since the Employers are engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB 1323 (1992).**

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by Operative Plasterers and Cement Masons International Association, Local Union 886.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by, April 3, 2002.

DATED at Cleveland, Ohio this 20th day of March, 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

420-1209